Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

TARIQ AHMAD BHATTI,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Tariq Ahmad Bhatti
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20 pp

QUESTION PRESENTED FOR REVIEW

Did the Immigration Judge violate Petitioner's constitutional right of fundamental fairness in ordering his deportation from the United States, where Petitioner and his family have a well-founded fear of persecution if Petitioner returns to his native Pakistan and where Petitioner cannot resume residence in Paraguay, because he no longer is entitled to resident status there?

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CITATIONS

Tariq Ahmad Bhatti vs. Immigration and Naturalization Service, No. 00-60224, 5th Circuit Court of Appeals (November 15, 2000)

In re: Tariq Ahmad Bhatti, Rohila Tariz Bhatti, Aziz Bhatti, Farooq Bhatti; Files: A29 695 250, A70 689 137, A70 689 139, A70 689 138; Board of Immigration Appeals (February 28, 2000)

STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks review of the order of the Circuit Court of Appeals for the Fifth Circuit entered on November 15, 2000, based on Petitioner's constitutional right of fundamental as guaranteed by the Fifth Amendment of the U.S. Constitution.

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment 5.

"...nor shall any person...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The Petitioner, his wife, and their two children are all citizens of Pakistan. After leaving Pakistan, Petitioner lived in Spain for several years and then lived in Paraguay for approximately nine years. Petitioner's two sons were born in Paraguay, but they remain Pakistani citizens.

On the issue of firm resettlement in Paraguay, Petitioner testified at his deportation hearing in San Antonio, Texas in 1993 that he was not granted permanent residence in Paraguay, but rather that his residence was "conditional," and was "subject to availability of his job." During the military coup in Paraguay in the spring of 1989, the company for which Petitioner worked was seized by the military. Petitioner could not renew his residence status because of his lack of employment and he was forced to leave the country.

The Petitioner then entered the United States on September 9, 1989 as a non-immigrant. His wife and their two children entered on March 10, 1993 as non-immigrants. They all overstayed their authorized stays.

Petitioner applied for political asylum based on his well-founded fear of persecution of Ahmadi Muslims in his native Pakistan. Ahmadi Muslims are a religious group of which he continued to be an active member. He held an office in his local group of Ahmadi Muslims in Austin, Texas, where he lived at the time. At the deportation hearing, he offered a letter from the Ahmadi movement in Islamic dated in 1990 as proof of his membership in that

religion.

Shortly before Petitioner's deportation hearing in 1993, the office of Petitioner's counsel was burglarized, and Petitioner's file was stolen. Many of his documents supporting his claim for political asylum were lost and never retrieved. Petitioner's ability to prove his asylum claim was compromised by this event.

Petitioner and his family now reside in Albuquerque, New Mexico. Petitioner's two sons are both full-time students who receive exceptionally outstanding grades and both of whom desire to continue their studies in the United States.

Petitioner appealed his case to the Board of Immigration Appeals. He then appealed to the Circuit Court of Appeals for the Fifth Circuit for review of the issue of violation of Petitioner's right to fundamental fairness.

ARGUMENT

The Immigration Judge violated Petitioner's constitutional right to fundamental fairness in ordering his deportation from the United States where Petitioner cannot return to his native Pakistan due to his well-founded fear of persecution and where Petitioner cannot resume residence in Paraguay because he has lost his resident status there. The Immigration Judge erroneously ruled that Petitioner and his family had firmly resettled in Paraguay. The unequivocal and consistent testimony of Petitioner at the hearing before the Immigration Judge was that he was

not a permanent resident of Paraguay. Petitioner testified that his residence was "conditional," and was "subject to availability of his job." Petitioner explained that although he had "residence" status, that status had to be renewed every ten (10) years and could only be renewed if the applicant had a job available to him. In Petitioner's case, his job ended when the company for which he worked was seized by the military government after the military coup in the spring of 1989. He was forced to leave the country after the coup, because his employment was taken away from him. Petitioner's testimony was that his company "was seized in the revolution" and "everybody left the country, deposits, stores, everything..." Because of the appropriation of his company by the military government, Petitioner would have been unable to renew his residency status due to the fact he no longer had employment.

The Board erroneously stated that Petitioner's residence card was issued in 1984 and was valid until 1994. This conclusion was drawn in error based on a statement made by the Service's attorney during the hearing. The actual residence card, however, which was examined at the hearing, indicated that the card was issued in 1981 and had to be renewed in ten (10) years, in other words, in 1991. Presumably, the Service attorney mistook the number of the "resolucion," (Spanish for "ruling"), which is indicated on the card as "No. 673/84.-", as the year of issuance of the card. In fact, the Petitioner left Paraguay in September of 1998, after his company was appropriated, and he had no means of renewing his

residence which expired in 1991 while he was in the United States.

The Board concluded that there was no indication that the residence of Petitioner and his family in Paraguay was a necessary consequence of their flight from persecution or that it was substantially restricted by the authorities. However, Petitioner testified that he was forced to abandon his previous temporary residence in Spain when he was given only fifteen (15) days to depart from that country. Moreover, as previously stated, Petitioner's testimony demonstrated that his residence in Paraguay was substantially restricted in that the company by which he was employed, and through which said employment allowed him to remain in Paraguay, was "seized by the revolution" and "everybody left the country, deposits, stores, everything...".

The Board also opined in its decision that the minor children of the Petitioner were likely eligible for permanent residence in Paraguay in light of their birth in that country. However, there is nothing in the record that supports that conclusion. On the contrary, Petitioner's uncontroverted testimony was that the children were Pakistani citizens, had Pakistani passports and that he had no reason to believe that they had Paraguayan citizenship.

Moreover, Petitioner cannot resume residency status in Paraguay. A representative for Petitioner contacted the Embassy of Paraguay in Washington, D.C., on March 22, 2000. In that telephone conversation, First Secretary of the Paraguayan Embassy, Enrique Insfran,

informed Petitioner's representative that even if a person has had residence in Paraguay, a resident would lose his or her residency status after being absent from Paraguay for a three-year period. Petitioner had been absent from Paraguay since September of 1989, over ten (10) years; and his three family members had been absent since March of 1993, a period of seven (7) years.

According to Secretary Insfran, the Petitioner would have to reapply for residency after entering Paraguay and would be required to demonstrate either: 1.) That the family had income sources outside of Paraguay by which they could support themselves; 2.) That they would be financially capable of investing in a Paraguayan company; or 3.) That they had a job offer in Paraguay. He stated that obtaining residence in Paraguay was a difficult matter. In fact, Petitioner would be unable to meet these requirements.

The Immigration Judge erroneously denied Petitioner's motion for consideration of a late-filed brief, despite Petitioner's documentation of medical emergency. Petitioner's brief before the Board was due on February 12, 1998. Petitioner submitted medical records showing that on January 15, 1998, Petitioner was transported by ambulance to a hospital emergency room for a severe asthma attack which required the administration of oxygen. Petitioner also submitted a doctor's certificate that he was unable to work for a two-week period after his emergency-room treatment, specifically from January 23, to February 5, 1998. Because Petitioner was too ill to

work, it is reasonable to infer that he was too ill to prepare his appeal brief. Petitioner's appeal was prosecuted pro se, without the assistance of counsel. Petitioner adequately demonstrated that his incapacity during this period of time prior to the deadline for submitting his brief was adequate grounds for an extension of time in which to file his brief.

The Board noted in its decision that the Petitioner and his family were represented by counsel before the Immigration Judge. However, Petitioner's counsel did not prosecute his appeal. As stated, Petitioner's appeal was conducted pro se. It was unreasonable for the Board to expect the Petitioner's wife to proceed with an appeal under these adverse circumstances of her husband's incapacitating illness, in light of the fact that the Petitioner was the one who testified at the hearing and whose situation formed the very basis of the asylum claim. Surely, the remedy of consideration of a late-filed brief should be available to respondents who are faced with unfortunate matters such as this that are totally beyond their control and which matters have been adequately documented. The information offered in Petitioner's brief would have contributed to the documentation of the asylum claim.

In Matter of Huang, 19 I&N 749 (1988), the BIA granted the Service's motion for consideration of a late-filed brief under what appeared to be less compelling reasons than those offered by Petitioner in this instance.

And finally, the Immigration Judge erroneously denied Petitioner's application for suspension of deportation on the basis that service of the Order to Show Cause cut short his period of continuous physical presence.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 15 2000
CHARLES R. FULBRUGE 111 CLERK

No. 00-60224
Summary Calendar

TARIQ AHMAD BHATTI,

Petitioner,

versus

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Board
Board of Immigration Appeals
BIA No. A99-695-250

Before DAVIS, JONES, and DeMOSS, Circuit Judges.
PER CURIAM:*

Tariq Ahmad Bhatti, a native of Pakistan, and his family petition this court for review of the Board of Immigration application for political asylum and for the

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

withholding of Appeals' (BIA) denial of their application for political asylum and for the withholding of deportation. They also seek review of the BIA's denial of Tariq Bhatti's deportation.

They argue that 1) The BIA erroneously determined that the Bhatti parents had firmly resettled in Paraguay that the Bhatti children were likely permanent residents of Paraguay because they were born there, 2) The BIA violated the petitioners' rights by refusing to consider their brief, which had been filed late, and 3) The BIA erroneously applied the illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) stop-time provision when determining whether Tariq had the requisite seven years of continuous physical presence in the United States for a suspension of deportation. The petitioners submit that the issue whether the IIRIRA's stop-time provision applies to show-cause orders issued before the IIRIRA's enactment is currently before the Second Circuit and that this court should hold review pending a decision therefrom. They also state that they have filed a motion to reopen their deportation proceedings and that this court should hold review of the instant petition until the BIA has ruled on the motion to reopen.

Although the petitioners challenge the BIA's finding that they firmly resettled in Paraguay, they do not challenge the BIA's determination that they failed to

establish a well-founded fear of persecution if returned to Pakistan. They have thus waived this argument, and we may affirm the BIA's denial of the petitioners' application for political asylum and the withholding of deportation based upon the BIA's determination of no well-founded fear of persecution. See Evans v. City of Marlin, Tex., 986 F.2d 104, 106 n.1 (5th Cir. 1993); Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988). The petitioners have not made a prima facie showing of their eligibility for political asylum and they have not established that they were substantially prejudiced by the BIA's refusal to review their late-filed brief. See Anwar v. I.N.S., 116 F.3d 140, 144 (5th Cir. 1997).

This court had held that the IIRIRA's stop-time provision applies to show-cause orders issued before the enactment of the IIRIRA. Gonzalez-Torres v. I.N.S., 213 F. 3d 899, 902-03 (5th Cir. 2000). The petitioners' argument with respect to Tariq's suspension of deportation application is without merit, and this court need not hold review of this issue pending a Second Circuit decision. Furthermore, the decision of the BIA is final such that this court has jurisdiction to review it notwithstanding the petitioners' subsequently filed motion to reopen. See Stone v. INS, 514 U.S. 386, 394-95 (1995).

The petition for review is DENIED. The petitioners' request that this court hold its review of the petition pending a Second Circuit decision and the BIA's ruling on their motion to reopen is **DENIED.**

U.S. Department of Justice
Executive Office for Immigration Review

Decision of
the Board of
Immigration Appeals

Falls Church, Virginia 22041

Files: A29 695 250 - San Antonio
A70 689 137
A70 689 139
A70 689 138

Date:
FEB 28 2000

In re: TARIQ AHMAD BHATTI
ROHILA TARIZ BHATTI
AZIZ BHATTI
FAROOQ BHATTI

IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENTS: Pro se
ON BEHALF OF SERVICE: Nancy A. Kryzanowski
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act
[8U.S.C.§1251(a)(1)(B)]
In the United States in violation
of law (all respondents)

APPLICATION: Asylum; withholding of deportation;

suspension of deportation

The respondents have appealed from an Immigration Judge's decision dated May 15, 1997, denying their applications for asylum, withholding of deportation, and suspension of deportation under sections 208, 243(h), and 244(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h), and1254(a), but granting them relief from deportation in the form of voluntary departure under section 244(e) of the Act, 8 U.S.C. §1254(e). The Immigration and Naturalization Service has filed a memorandum adopting the Immigration Judge's decision. The respondent's appeal will be dismissed.

The respondents are a male and female, married couple, and their two minor children, all citizens of Pakistan. The male respondent first entered the United States on September 9, 1989 as a non-immigrant; the female respondent and the two children entered the united States on March 10, 1993 as non-immigrants. All four respondents remained in the United States longer than permitted without authorization. On January 27, 1995, the Immigration and Naturalization Service served each respondent, via certified mail, with an Order to Show Cause, charging that they are deportable from the United States under section 24(a)(1)(B) of the Act for having remained in the United States longer than permitted.

Based on the lead respondent's admissions at the deportation hearing, the Immigration Judge found that all

four respondents are deportable as charged. The respondents submitted applications for asylum, withholding of deportation, suspension of deportation, and voluntary departure. The Immigration Judge determined that the respondents were not eligible for asylum and withholding of deportation because they had firmly resettled in Paraguay. In addition, the Immigration Judge concluded that the respondents had failed to meet their burden of proving that they fall within the definition of a "refugee" at section 101(a)(42) of the Act.

The Immigration Judge's denial of the respondents' application for suspension of deportation was based on their
inability to establish 7 years of continuous physical presence in the United States. Instead of entering an order of deportation against the respondents, the Immigration Judge granted their request for voluntary departure. The respondents filed a timely appeal from this decision.

The record reflects that the respondents were given until February 12, 1998, to submit a brief in support of their appeal, but a brief was not filed until March 9, 1998. This Board instructed the respondents that they could resubmit their brief accompanied by a motion for consideration of a late-filed brief.

On April 2, 1998, the respondents submitted a motion explaining that the male respondent became seriously sick when he received the briefing schedule and that they had to be taken by ambulance to the hospital.

The respondent has submitted medical records to support this allegation. Although the male respondent is the lead respondent, the respondents were represented by counsel before the Immigration Judge and have failed to explain why the female respondent could not proceed with the appeal in a timely manner. We therefore deny the respondents' motion to consider their late-filed brief on appeal.

Moreover, the respondents have submitted with their appeal brief new evidence that was not presented before the Immigration Judge. This evidence includes a copy of Martial Law Ordinance XX, published in the Gazette of Pakistan on April 26, 1984; a copy of a report entitled Persecution of Ahmadi Muslims - Pakistan - 1995; a letter from the Ahmadiyya Muslim Foreign Missions Office, dated August 22, 1995; a letter form the respondents' attorney dated March 27, 1996; and copies from the minor respondents' school certificates. Because our review is limited to the record as it was constituted before the Immigration Judge, and because these documents
were available before the respondents' hearing on May 15, 1997, we do not consider these documents. Matter of Fedorenko, 19 I&N Dec. 57, 74 (BIA 1984).

However, we note that the respondents have also submitted a copy of an article entitled Persecution of Ahmadies in Pakistan, published in the Ahmadiyya Gazette in October 1997. We will consider this article on appeal because it was not published until after the

respondents' hearing and it provides information regarding the country conditions in Pakistan since the time of their deportation hearing. See generally 8 C.F.R. §§ 3.2 and 208.

Upon review of the record, we agree with the immigration Judge's finding that, based on the evidence in the record and the lead respondent's testimony (Tr. At 19-23 and 29-36), the respondents had been firmly resettled in Paraguay. See 8 C.F.R. §§ 208.13(c)(2)(B) and 208.15. The lead respondent's resident alien card for Paraguay indicated that he had permanent residence and that the card needed to be renewed after 10 years. There is no indication that the respondents' residence in Paraguay was a necessary consequence of their flight from persecution or that it was substantially restricted by the authorities. 8 C.F.R. § 208.15. We also note that the minor respondents are likely eligible for permanent residence in Paraguay in light of their birth in that country.

Further, we find that, even if the respondents were not firmly resettled in Paraguay, they have failed to establish that they have a well-founded fear of future persecution if returned to Pakistan. The lead respondent testified that he still has family living in Pakistan and that he returned in 1987 without incident. The respondents have not made a showing that persecution is a reasonable possibility. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 191&N Dec. 439 (BIA 1987).

Finally, we agree with the Immigration Judge's denial of the respondents' application for suspension of deportation. The male respondent first entered the United States in 1989, but his Order to Show Cause was served in 1995. He is therefore unable to establish 7 years of continuous physical presence. See section 244(a) of the Act; Matter of Nolasco, Interim Decision 3385 (BIA 1999).

Because we find no reason to disturb the immigration Judge's decision, the following orders will be entered.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD